BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAMUEL J. SCHROEDER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,045,682
HESLET TRUCKING, INC.	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY UNKNOWN	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the May 19, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

The ALJ concluded the claimant was not an employee of the respondent and, as such, claimant's accident was not compensable under the Workers Compensation Act.[1] Respondent also raised the issue of whether claimant's accident arose out of and in the course of employment.[2]

The claimant requests review of the preliminary hearing Order and alleges that respondent and claimant had an employer-employee relationship because respondent exercised control over claimant's work, claimant's work was exclusive to and/or authorized by respondent and that respondent directly benefitted from claimant's work. In the alternative, claimant argues respondent should be estopped from denying workers

[1] ALJ Order (May 19, 2010).

[2] P.H. Trans. at 5.

compensation coverage as respondent had promised to provide him with workers compensation insurance coverage, "and if coverage was in fact not in placed *[sic]* by the respondent on the date of accident, the Kansas Workers Compensation Fund should be placed on the risk."[3] Accordingly, claimant requests medical treatment, medical expenses and reimbursement of unauthorized medical expenses related to the alleged October 16, 2008 accident.

The respondent requests the Order of the ALJ be affirmed. Respondent denies the employer-employee relationship existed because respondent did not have authority to control the work activities of the claimant on the day of the alleged accident. Respondent also maintains estoppel does not apply as it notified claimant that it was being audited and that the insurance carrier canceled its workers compensation policy. Finally, respondent maintains that claimant was not acting within the course and scope of employment.

The Fund requests the preliminary hearing Order be affirmed. The Fund alleges the claimant contracted to do work according to his methods without being subject to the control of the respondent. The Fund argues estoppel is not applicable as claimant had stopped paying respondent for insurance coverage approximately 45 days before the accident occurred. Accordingly, the Fund asserts claimant is an independent contractor.

The issues are:

- Whether an employer-employee relationship existed between claimant and respondent on October 16, 2008.
- If not, should respondent be estopped to deny that claimant was its employee because it had promised to provide claimant with workers compensation insurance coverage?
- Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?[4]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

[3] Claimant's Brief at 14 (filed June 23, 2010).

[4] P.H. Trans. at 5.

In 2006, the claimant and his wife commenced operations as R & J Trucking (R & J), a sole proprietorship.[5] Following its formation, R & J sought to lease its equipment to a third party. A lease agreement was then entered into between claimant d.b.a. R & J Trucking and Heslet Trucking, Inc., the respondent, whereby R & J would lease two trucks to respondent. The lease agreement itself, despite identifying the claimant as the lessee and respondent as the lessor, solely governed the lease of vehicles and did not otherwise address the relationship between the two parties. An oral agreement was thus formulated and provided that R & J would utilize respondent's licenses and operating authority. As part of this agreement with the respondent, the claimant completed a Driver's Application for Employment and underwent mandatory drug testing, which was paid by the respondent. Under the agreement respondent would make efforts to broker loads on behalf of R & J and dispatch the loads. In return, R & J would pay respondent a fee equal to 10 percent of the gross proceeds of the load, a fee claimant would characterize as a brokerage fee or a lease fee. In addition, R & J paid respondent for general liability insurance and workers compensation insurance.

The claimant submitted weekly load sheets to the respondent from which a gross amount of pay would be calculated. The respondent deducted a portion of the gross proceeds for the claimant's general liability insurance and workers compensation insurance. Respondent also retained a portion of the net proceeds as its fee and sent the remainder to claimant as payment for his work.

The respondent brokered loads as agreed and told claimant how many loads were available, where they were to be picked up, where they needed to go, and the pay rate.

R & J also brokered loads for its own benefit. In those instances, R & J would contact and inform respondent that R & J had found a load. Provided that respondent had not booked R & J's trucks, R & J would transport the loads that it found. Claimant indicated that both he and R & J driver, Randy Tinkel,[6] were free to drive for others during the course of R & J's relationship with respondent.

R & J paid for all its expenses associated with its operation and controlled the decisions relative to its personnel. R & J hired Mr. Tinkel as a driver, and paid him directly for his services. Mr. Tinkel worked on most, if not all, of the jobs that R & J performed in conjunction with respondent. The retention of Mr. Tinkel and the identification of which loads that he would personally deliver were governed by R & J, not the respondent. Claimant believed Mr. Tinkel was an independent contractor of R & J.

---

[5] *Id.*, at 51.

[6] This individual is referred to as both Randy Tinkel and Randy Cinkel in the record.

R & J paid all of its non-labor expenses associated with its operation, including fuel, maintenance, and repair expenses. Once expenses were paid, claimant and his spouse retained what remained. Claimant was responsible for paying his self-employment taxes.

Claimant chose the routes that he would travel. R & J maintained separate insurance on its vehicles, filed an insurance claim relative to the accident at issue in this matter and received benefits under that insurance policy. R & J's insurance coverage also included a liability policy maintained separate and apart from that obtained by or through respondent. Finally, R & J would on occasion bill a shipper directly for its work rather than seek compensation through the respondent.

In short, R & J benefitted from the arrangement with respondent as R & J could utilize respondent's more expansive operating authority and licensing. In addition, R & J was relieved of paperwork and the expense of obtaining additional regulatory authority to operate its trucks in a larger area. Respondent, on the other hand, benefitted from the arrangement as it received income from the loads that R & J hauled and, in exchange, respondent handled paperwork that it was already obligated to complete for its other trucks.

In late September or early October 2008, R & J entered into an agreement with Gruber Trucking (Gruber) to haul material. Gruber contacted R & J directly regarding the job. Both claimant and Randy Tinkel worked on the Gruber job. Under the agreement, Gruber was to pay R & J directly for its services. Claimant contends he received respondent's permission to haul for Gruber. Respondent denies knowing that claimant was going to haul for Gruber.

On October 16, 2008, while waiting to pick up a load on the Gruber job, the claimant's truck was involved in a motor vehicle accident wherein claimant was thrown from his truck and injured. At the time of the accident claimant was using one of respondent's trailers. Claimant explained that he had swapped trailers with respondent as respondent's was more suitable for the job. Following the accident, claimant was taken to Lawrence, Kansas, for medical treatment and he underwent mandatory drug testing, which was paid by the respondent.

Following the accident, claimant tried to make a claim for workers compensation insurance benefits, but he was informed that the workers compensation policy held by respondent had been canceled. Respondent's workers compensation insurance policy was canceled at the end of July 2008. The record, however, indicates respondent received or retained money on behalf of R & J for workers compensation insurance after that date. Claimant maintains that respondent never advised him or the other drivers that their workers compensation insurance had been canceled. Respondent denies that assertion.

The primary test utilized in Kansas to determine whether an employer-employee relationship exists is whether the employer has the right of control and supervision of the work of the employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control that is determinative.[7]

In addition to examining the extent of control and supervision, other factors that are relevant in analyzing the relationship between parties are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[8]

R & J paid for all of its expenses from its operations; retained its own driver; provided its own trucks and trailers; contracted with other parties; solicited work on its own behalf; could and did receive payment directly for services rendered to others than respondent; and chose its own routes. Moreover, on October 16, 2008, R & J was working for Gruber Trucking, not the respondent. The undersigned finds the facts do not establish an employer-employee relationship between the claimant and the respondent.

Notwithstanding the above, claimant next argues respondent should be estopped from denying that claimant was its employee as respondent had promised to provide him with workers compensation insurance coverage.

> Equitable estoppel may prevent enforcement of contract provisions. To prevail on the grounds of equitable estoppel requires a showing that (1) the party claiming

---

[7] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994); *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); and *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[8] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

> equitable estoppel was induced to believe certain facts existed by the other party's acts, representations, admissions, or silence when under a duty to speak; (2) the party relied and acted upon those facts; and (3) the party would be prejudiced if the other party were allowed to deny the existence of those facts.[9]

And the doctrine of equitable estoppel is applicable to a claim under the Workers Compensation Act.[10] In *Marley*, the claimant was estopped from denying he was an independent contractor while working for the alleged employer.

There is no question that respondent agreed to provide R & J with workers compensation insurance coverage. Respondent routinely withheld the premiums for that insurance from R & J's earnings. During a period when R & J received payments directly from another party rather than through respondent, R & J paid respondent for the insurance. The testimony presented by respondent that it advised claimant of the workers compensation insurance being canceled is not persuasive. The testimony of respondent's owner is not particularly credible. Conversely, the record establishes that respondent either received or retained money from R & J for workers compensation insurance after the workers compensation insurance policy was canceled in late July 2008.

Claimant contends he drove his truck and hauled exclusively for respondent. Assuming that were true, the Workers Compensation Act specifically provides that the purchase of workers compensation insurance by respondent would not create the employer-employee relationship between the parties. The Act provides:

> (b) Notwithstanding any other provision of this act, a licensed motor carrier may by lease agreement or contract secure workers compensation insurance for an owner-operator, otherwise subject to the act by statute or election, and may charge-back to the owner-operator the premium for such workers compensation insurance, and by doing so does not create an employer-employee relationship between the licensed motor carrier and the owner-operator, or subject the licensed motor carrier to liability under subsection (d)(1) of K.S.A. 44-5,120 and amendments thereto.
>
> (c) For purposes of subsection (b) of this section only, "owner-operator" means a person, firm, corporation or other business entity that is the owner of one or more motor vehicles that are driven exclusively by the owner or the owner's employees or agents under a lease agreement or contract with a licensed motor carrier; provided that neither the owner-operator nor the owner's employees are treated under the term of the lease agreement or contract with the licensed motor carrier

---

[9] *Sheldon v. KPERS*, 40 Kan. App. 2d 75, Syl. ¶ 7, 189 P.3d 554 (2008).

[10] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, Syl. ¶ 3, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

> as an employee for purposes of the federal insurance contribution act . . . , the federal social security act . . . , the federal unemployment tax act . . . , and the federal statutes prescribing income tax withholding at the source . . . .[11]

Arguably, if obtaining workers compensation insurance for an exclusive driver would not create the employer-employee relationship, the failure to retain such insurance for a non-exclusive driver would not be sufficient grounds to create that relationship through estoppel.

When considering the entire record, the undersigned finds that estoppel does not apply and, therefore, the employer-employee relationship did not exist between claimant and respondent at the time of the accident. Moreover, claimant's accident did not arise out of his relationship with respondent as claimant was not performing work on behalf of, or for, respondent at the time of the accident.

In summary, the preliminary hearing Order should be affirmed. The employer-employee relationship did not exist between claimant and respondent at the time of the accident, estoppel does not apply, and claimant was not acting within the course of employment with respondent when the accident occurred.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of ALJ Brad E. Avery dated May 19, 2010, is affirmed.

IT IS SO ORDERED.

---

[11] K.S.A. 2008 Supp. 44-503c.

[12] K.S.A. 44-534a.

[13] K.S.A. 2009 Supp. 44-555c(k).

Dated this ____ day of January, 2011.

DAVID A. SHUFELT
BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant
Nicholas J. Meinheit, Attorney for Respondent
Darin M. Conklin, Attorney for Fund
Brad E. Avery, Administrative Law Judge